

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





76-2165

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In The United States Court of Appeals  
For The Second Circuit

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JOSEPH DEL VECCHIO,

Petitioner-Appellant,

-against-

THE UNITED STATES OF AMERICA,

Respondent-Appellee.

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On Appeal From A Memorandum And Order Of  
The United States District Court  
For The Southern District  
Of New York

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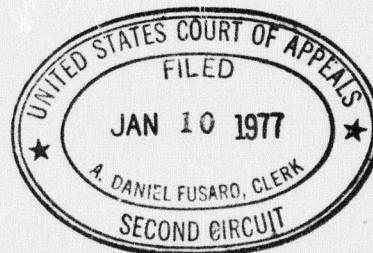
APPELLANT'S APPENDIX

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SAXE, BACON & BOLAN, P.C.

Attorneys for Petitioner-  
Appellant

39 East 68th Street  
New York, New York 10021  
(212) 472-1400



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## DOCKET ENTRIES

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## PLAINTIFFS

DEL VECCHIO, JOSEPH

## DEFENDANTS

DUFFY, J

THE UNITED STATES OF AMERICA

BEST COPY AVAILABLE

28 U.S.C. §2255 CAUSE  
 Petitioner was not accorded his rights under  
 FRCP 11 at time of acceptance & entrance to  
 plea of guilty to indict. #73.CR 1099. )  
 TO VACATE SENTENCE.

## ATTORNEYS

Saxe, Bacon & Bolan P.C.  
 39 East 68th St.  
 New York, NY 10021  
 472-1400

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10-22-76 1716

DEL VECCHIO, JOSEPH

VS: THE UNITED STATES OF AMERICA

PG.

DATE	NR.	PROCEEDINGS	DUFFY, J
10-22-76	1.	Filed Petitioner's Affidavit in support of application pursuant to 28 U.S.C. §2255 in the nature of a writ of habeas corpus, by Michael Rosen.	
10-22-76	2.	Filed Petitioner's Memorandum of Law.	
10-29-76	(3)	Filed petitioner's affdvt. and notice of motion for an order pursuant to 28 U.S.C. Sec. 2255 setting aside and vacating the sentence, etc...	
10-29-76	(4)	Filed petitioner's memorandum of law in support of motion.	
11-15-76	(5)	Filed Order— for the reasons stated, the application for relief under Section 2255 of Title 28 is therefore denied. It is so ordered— DUFFY, J. (p/h)	
12-08-76	(6)	Filed Petitioner's notice of appeal to USCA from the Memorandum and Order dated 11-12-76.. Copiesto: Joseph Del Vecchio and U.S. Atty., SD of N.Y.	
12-09-76	(7)	Filed notice that the record on appeal has been certified and transmitted to the USCA this day.	

NOTICE OF APPEAL

3a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

JOSEPH DEL VECCHIO,	:	
Petitioner,	:	76 CIV 4716
	:	(KTD)
- against -	:	
UNITED STATES OF AMERICA,	:	<u>NOTICE OF APPEAL</u>
Respondent.	:	

-----X

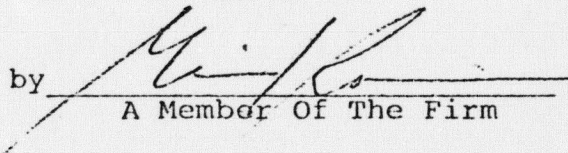
SIRS:

PLEASE TAKE NOTICE that the Petitioner, Joseph Del Vecchio, hereby appeals to the United States Court of Appeals for the Second Circuit, from the Memorandum and Order of the Honorable Kevin Thomas Duffy, Judge of the United States District Court for the Southern District of New York, dated November 12, 1976, and from each and every part thereof.

Dated: New York, New York  
November 19, 1976

Yours, etc.

SAXE, BACON & BOLAN, P.C.  
Attorneys for Petitioner  
39 East 68th Street  
New York, New York 10021  
(212) 472-1400

by   
A Member Of The Firm

TO: JOSEPH DEL VECCHIO  
#76701  
P.O. Box 1000  
Lewisberg, Pennsylvania 17877



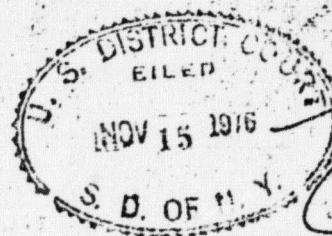
HON. ROBERT FISKE  
United States Attorney for the  
Southern District of New York  
One St. Andrew's Plaza  
New York, New York 10007

CLERK OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK  
40 Centre Street  
Foley Square  
New York, New York 10007

ORDER APPEALED FROM

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----x  
JOSEPH DEL VECCHIO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.  
-----x

ORDER

76 Civ. 4716

APPEARANCES:

SAXE, BACON & BOLAN, P.C.  
Attorneys for Petitioner  
By: Roy M. Cohn, Esq.  
Michael Rosen, Esq.  
Ronald Poepplein, Esq.  
Of Counsel

HON. ROBERT B. FISKE  
United States Attorney, S.D.N.Y.  
Attorney for Respondent

MICROFILM

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KEVIN THOMAS DUFFY, D.J.

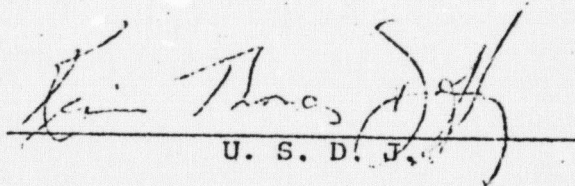
The application having been made under Section 2255, Title 28, it is alleged that this Court was in error in failing to advise the defendant as to the minimum sentence which he could serve. See United States v. Tramunti, 73 Cr. 1099. It may be that I did not advise the defendant of the minimum sentence possible. It was my conclusion



that the defendant was responsible for the importation of two kilos of pure heroin per week for a period of years. A discussion of probation in such a situation was needless. The other matters which the defendant raises are without merit.

The application for relief under Section 2255 of Title 28 is therefore denied.

IT IS SO ORDERED.

  
U. S. D. J.

Dated: New York, New York  
November 12, 1976.

-----X  
JOSEPH DEL VECCHIO,

Petitioner,

- against -

THE UNITED STATES OF AMERICA,

Respondent.  
-----X

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:

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7a

76 Civil 4716  
(KTD)

NOTICE OF MOTION

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of Michael Rosen, Esq., duly sworn to on the 21<sup>st</sup> day of October, 1976, the record of proceedings contained in 73 Cr. 1099, and all prior pleadings and proceedings heretofore had herein, the undersigned shall move this Court at such date, time and place as the Court may direct at the Courthouse, 40 Centre Street, New York, New York for an order pursuant to 28 U.S.C. §2255, setting aside and vacating the sentence imposed herein, allowing the petitioner to plead anew to the charges contained in Indictment No. 73 Cr. 1099, or, in the alternative, for an evidentiary hearing on such issues, for the immediate release of the petitioner; and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York  
October 21, 1976

Yours, etc.,

SAXE, BACON & BOLAN, P.C.  
Attorneys for Petitioner  
39 East 68th Street  
New York, New York 10021  
(212) 472-1400

By S. MICHAEL ROSEN  
A Member of the Firm

TO: HON. ROBERT B. FISKE  
United States Attorney for  
The Southern District of New York  
1 St. Andrew's Plaza  
New York, New York 10007



The petitioner was originally charged in a multi-count indictment with possession and the intent to distribute heroin in violation of 21 U.S.C. §§173, 174, 812, 841(a)(1) and 841(b)(1)(a). On January 14, 1974, the petitioner entered a plea of guilty to Counts 1, 11, 12, 13, 23, 24 and 27 of the indictment 73 Cr. 1099, which counts charged conspiracy to possess, facilitate and distribute narcotics and substantive counts relative to such possession, and facilitation. (For the convenience of the Court, a copy of petitioner's plea before the Honorable Kevin Duffy is annexed as Exhibit A). At the time of the plea, petitioner was represented by Gino E. Gallina, Esq., and the government was represented by United States Attorney Paul J. Curran and Assistant United States Attorney Walter M. Phillips. On May 20, 1974, the petitioner was sentenced to fifteen (15) years imprisonment with three (3) years special parole to commence

on completion of his imprisonment.

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It is the petitioner's contention that the sentence therein should be vacated and he be permitted to withdraw his plea of guilty based on the failure of the judge to fully comply with Rule 11 of the Federal Rules of Criminal Procedure (hereinafter FRCrP. 11) which states in part that:

"Before accepting a plea of guilty or nolo contendere, this Court must address the defendant personally in open court and inform him of, and determine that he understands the following:

- (1) The nature of the charge to which the plea is offered, the mandatory minimum provided by law, if any, and the maximum possible penalty provided by law; . . ."  
F.R.Cr.P.11(c)(1).

This is the present statement of Rule 11. At the time petitioner entered his plea, the Rule required that the defendant understand "the consequences of his plea." As appears herein, the petitioner was not accorded his rights under the Rule.

Specifically, petitioner urges such relief based on his not being advised as to the outer parameters of the potential penalties he faced by virtue of his plea as well as the minimum mandatory punishment for which he was liable.

The petitioner is presently incarcerated in the Federal Penitentiary at Lewisburg, Pennsylvania. He has been there since July of 1973 when he was sentenced to three (3) years imprisonment on another matter by Judge Inzer Wyatt, United States District Judge, Southern District of New York. Since this original sentence has more than been served, should this Court grant the instant application, we request that the petitioner be immediately released, as prior to his incarceration, he had been free on bail on both matters.



At the time of the petitioner's plea, the Court 10a  
ascertained that there was a factual basis for the plea and  
attempted to explain the possible penalties for the petitioner.  
The Court informed the petitioner that he faced incarceration for  
fifteen (15) years with an additional penalty of fifteen (15)  
years if a second offender information was filed, as well as  
potential fine of \$25,000. The petitioner was not advised of  
the minimum mandatory penalty to which he was exposed under  
21 U.S.C. §§173 and 174, nor of the mandatory special parole for  
which he would be liable at the end of his sentence pursuant to  
21 U.S.C. §841(a)(1) and (b)(1)(a).

"...a defendant is entitled to plead anew  
if a United States District Court accepts  
his guilty plea without fully adhering to  
the procedure provided for in Rule 11."  
McCarthy v. United States, 394 U.S., 459,  
463-464, 89 S.Ct. 1167, 22 L.Ed.2d 418  
(1969)

Under the Comprehensive Drug Abuse Prevention and Control Act of  
1970 (21 U.S.C. §401(b)(1)(b) and §841 (b)(1)(B), prior to the  
acceptance of a guilty plea, the trial judge must inform the  
defendant of the mandatory term of special parole. As is evident  
from the January 14, 1974 transcript, no such information was  
imparted to the petitioner. As more clearly set forth in the  
accompanying memorandum of law, this omission requires that the  
sentence be vacated, the petitioner be released, and be allowed  
to withdraw his plea and plead anew. At the very least, an  
evidentiary hearing should be held on these issues.

WHEREFORE, it is respectfully requested that this  
application be granted in all respects.

Sworn to before me this

2/5 day of October, 1976

S)

S |

MICHAEL ROSEN

RONALD F. POEPPLEIN  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 30-4503069  
Qualified in Nassau County  
Commission Expires March 30, 1977

MP

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

versus

CARMINE TRAMUNTI et al.,

Defendants.

73 Cr 1099

Plea of DelVecchio

New York, N. Y.

January 14, 1974 - 11:25 a.m.

Before

HON. KEVIN THOMAS DUFFY,

District Judge

APPEARANCES:

PAUL J. CURRAN, Esq.,  
United States Attorney for the Southern District  
of New York

WALTER M. PHILLIPS, JR., Esq.,  
Assistant United States Attorney

GINO GALLINA, Esq.,  
Attorney for Defendant DelVecchio

- - -



MP

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MR. GALLINA: Good morning, your Honor.

As your Honor knows, I represent the defendant Joseph DelVecchio. I have had long and protracted conversations with him about whether or not he intended to stand trial. It is his desire, after, also, conversations that I have had with Mr. Phillips, to plead guilty to Counts 1, 11, 12, 13, 23, 24 and 27.

It is my understanding that the remaining counts, 3 and 4, at the time of sentencing, would be dismissed at the recommendation of the Government.

MR. PHILLIPS: At the request of defense counsel, without any opposition by the Government.

THE COURT: All right, Mr. DelVecchio --

MR. GALLINA: Your Honor, may I have the defendant's wife here?

THE COURT: Surely.

(Mrs. DelVecchio enters the robing room.)

MR. GALLINA: Your Honor, I have also indicated to the defendant in the conversations that I have had with Mr. Phillips concerning the desire of the Government to call him as a witness. I have already indicated to your Honor and to the Government that Mr. DelVecchio does not intend to testify in behalf of any defendant or on behalf of anybody in the case, and I have discussed this with all the attorneys and



1  
2 other defendants who might be concerned, and they have in-  
3 dicated to me that they will not call him as a witness.

4 I have also indicated to him the Government has  
5 stated previously on the record to me that they also do not  
6 intend to call him as a witness, and he wanted to have that  
7 understanding before he went ahead with his plea.

8 Again, your Honor, it is my respectful --

9 MR. PHILLIPS: There is one other thing, I think,  
10 if you want to take it up now, what we have discussed down-  
11 stairs, and that is waiver of the question of timeliness of  
12 the Government to file a prior offender information, since  
13 Mr. Gallina indicated he was not waiving, and we consent to  
14 this, either the question of identity, whether in fact Mr.  
15 DelVecchio is in fact the individual involved, or the validity  
16 of the underlying conviction, but it is the Government's  
17 intention to charge Mr. DelVecchio as a prior offender,  
18 based on his plea of April 1973 to charges under 843(b),  
19 Title 21, which involves the use of a wire facility to  
20 promote a narcotics conspiracy.

21 MR. GALLINA: I would waive that portion that Mr.  
22 Phillips so indicated, the timeliness of service of notice,  
23 which Mr. Phillips understands to be prior to the sentencing  
24 or verdict.

25 MR. PHILLIPS: The entry of a plea.



MP

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THE COURT: Do you have the thing, the notice, now?

3

MR. PHILLIPS: No, your Honor.

4

MR. GALLINA: No, your Honor.

5

THE COURT: All right.

6

MR. GALLINA: It is the defendant's desire to

7

withdraw his plea as to those counts I have already mentioned

8

and plead guilty at this time.

9

BY THE COURT:

10

Q Mr. DelVecchio, have you read the indictment?

11

A Yes, sir.

12

Q Have you gone through it with your attorney?

13

A Yes, sir.

14

Q I understand that you now wish to plead guilty; is that correct?

15

16

A Yes, sir.

17

Q Do you wish the indictment, those counts read to you at this time?

18

19

A What did you say, your Honor?

20

Q Do you want me to read those counts?

21

A No. I have read them.

22

Q All right. Before I can accept a plea of guilty,

23

it is necessary for me to be sure that you are acting

24

voluntarily, with a complete understanding of your rights,

25

and that you understand the consequences of your plea and



MP

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that in fact you are guilty.

A Yes, sir.

Q Do you know that if you continue your not guilty plea, you would be entitled to a speedy trial and that the Government would have to confront you with witnesses? Do you understand that?

A Yes, sir.

Q Do you have an understanding that at that trial you would be presumed innocent until such time as the testimony and exhibits in evidence would prove that you were guilty beyond a reasonable doubt?

A Yes, sir.

Q Do you understand that you would be presumed innocent?

A Yes, sir.

Q Do you know that at such a trial you would have a right to call witnesses on your own behalf?

A Yes, sir.

Q Do you know that if you wanted me to, I would issue subpoenas for those witnesses to appear?

A Yes, sir.

Q All right. Do you understand that the first count of this indictment is basically a conspiracy count, charging you with conspiring to traffic in various narcotic drugs? Do



1 MP

2 you understand that?

3 A Yes, sir.

4 Q And the other counts to which you are pleading  
5 basically charge you with either transporting or facilitating  
6 the transportation and sale and purchase of certain narcotic  
7 drugs: do you understand that?

8 A Yes, sir.

9 Q Do you know that for each of the counts in the  
10 indictment, you could be sentenced to a term of fifteen  
11 years, and if this second offender information is filed that  
12 they are talking about, it could be a possible maximum of  
13 thirty years? Do you understand that?

14 A Yes, sir.

15 Q Do you understand you could also be fined?

16 A Yes, sir.

17 Q I believe the fine is --

18 MR. PHILLIPS: \$20,000, your Honor.

19 Q (Continuing) -- \$20,000?

20 A Yes, sir.

21 Q Have any threats or promises been made to you  
22 to induce you to plead guilty?

23 A No, sir.

24 MR. PHILLIPS: It is \$25,000, your Honor. I was  
25 thinking of the old law.



1  
2 THE COURT: \$25,000.

3 MR. GALLINA: You understand that it is \$25,000?

4 DEFENDANT DELVECCHIO: Yes, sir.

5 Q Has anyone suggested to you in any way that there  
6 is any understanding about what kind of a sentence you would  
7 get?

8 A No, sir.

9 Q Has anyone made any prediction to you as to what  
10 you would get?

11 A No, sir.

12 Q In fact, did you commit the offenses to which you  
13 are pleading guilty?

14 A Yes, sir.

15 THE COURT: All right. Let me have the indictment,  
16 please.

17 Q Did you agree with others to facilitate and dis-  
18 tribute and possess with intent to distribute the narcotic  
19 drugs?

20 A Yes, sir.

21 THE COURT: What is the next one?

22 MR. GALLINA: 11.

23 Q In November of 1970, did you have possession or  
24 did you conceal or facilitate the transportation and con-  
25 cealment of a quarter kilogram of heroin?



MP

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1  
2 A Yes, sir.

3 Q Do you want to tell me what happened?

4 A I had possession of a quarter kilogram of heroin.

5 Q You did?

6 A Yes, sir.

7 THE COURT: What is the next count?

8 MR. GALLINA: 12.

9 Q All right. Again, in November of 1970, did you  
10 have possession of another quarter kilogram of heroin?

11 A Yes, sir, your Honor. I had possession of it.

12 MR. GALLINA: Next is 13.

13 Q Once again, did you have possession in November  
14 of 1970 of a third quarter-kilogram of heroin?

15 A Yes, sir, your Honor. I had possession of it.

16 MR. GALLINA: Number 23, your Honor.

17 Q And about July 1972, did you have possession or  
18 did you attempt to distribute three kilograms of heroin?

19 A Yes, sir, your Honor. I had possession.

20 Q Count 24 is the next one. In October did you have  
21 possession of another three kilograms of heroin?

22 A Yes, sir. I had possession of it.

23 MR. GALLINA: Count 27, your Honor, the last count.

24 Q In May 1973, Mr. DelVecchio, did you have posses-  
25 sion of another three kilograms of heroin?



1  
2 A Yes, sir, your Honor. I had possession.

3 Q Under all the circumstances, do you still wish to  
4 plead guilty to these counts?

5 A Yes, your Honor.

6 THE COURT: Mr. Gallina, do you know of any reason  
7 whatsoever why the Court should not accept the plea of  
8 guilty?

9 MR. GALLINA: No. I know of no reason.

10 THE COURT: Mr. Curran, do you know of any reason  
11 why the Court should not accept the plea of guilty of Mr.  
12 DelVecchio?

13 MR. CURRAN: No, your Honor.

14 THE COURT: All right. I find that the plea is made  
15 knowingly and voluntarily and has a basis in fact and  
16 contains all of the elements of the crime as charged and there-  
17 fore will be accepted.

18 Mr. DelVecchio, I believe a pre-sentence report  
19 was made up for you a short time ago.

20 DEFENDANT DELVECCHIO: Yes, your Honor.

21 THE COURT: Have you been at West Street since  
22 you were sentenced down there?

23 MR. GALLINA: Yes, your Honor. He has also been  
24 committed to the Federal Penitentiary at Sandstone, Minnesota,  
25 for a period of time and was on his way being transferred to



1 MP

10

2 Pennsylvania, Allenwood, so there should be probation or  
3 parole recommendations et cetera that are at those institutions  
4 which I would ask your Honor to incorporate into any pre-  
5 sentence report.

6 THE COURT: All right. Do you understand the  
7 request, Mr. DelVecchio, that your counsel just made?

8 DEFENDANT DELVECCHIO: Yes, your Honor.

9 THE COURT: Basically, in order for me to intel-  
10 ligently sentence you, I want to find out what you did prior  
11 to going to prison, and I want to find out how you have  
12 reacted to prison. It makes a difference, a big difference.

13 DEFENDANT DELVECCHIO: Yes; I know.

14 THE COURT: And I would not do it without your  
15 consent.

16 DEFENDANT DELVECCHIO: Definitely, sir.

17 MR. GALLINA: Not only that, your Honor. I would  
18 waive any necessity for preparing a new probation report,  
19 since he has been in prison continuously since the last  
20 probation report.

21 THE COURT: All right.

22 MR. GALLINA: Thank you very much, your Honor.

23 THE COURT: I can't set a date until I get all  
24 that information. Let me just sign this so that the marshal  
25 can have his paper work in proper order.

MP

10[a]

MR. GALLINA: Your Honor, could the marshal allow  
the defendant one minute with his wife, outside?

THE COURT: Surely.

MR. GALLINA: Thank you, your Honor.

- - -



COPY RECEIVED  
ROBERT S. ECKE JR.  
JAN 10 1977  
U. S. ATTORNEY  
NO. DIST. OF N. M.